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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

JAN 22 1993

In the Matter of)
)
 Petition for Declaratory Ruling)
 Concerning Section 312(a)(7))
 of the Communications Act)

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

MM Docket No. 92-254

**COMMENTS OF THE
 NATIONAL ASSOCIATION OF BROADCASTERS**

1. The National Association of Broadcasters ("NAB")¹, by counsel, hereby submits its comments in response to the Commission's Public Notice and Request for Comments in the above-referenced matter, 7 FCC Rcd 7297 (1992) (hereinafter "Public Notice").²

2. In this proceeding, the Commission seeks comment, inter alia, "on all issues concerning what, if any, right or obligation a broadcast licensee has to channel political advertisements that it reasonably and in good faith believes are indecent."

3. The Commission has thus come face to face with the implications of the January 19, 1984, letter from Chairman Mark S. Fowler to Congressman Thomas A. Luken, and the accompanying staff memorandum dated January 6, 1984. The

¹ NAB is a nonprofit, incorporated association which serves and represents America's radio and television broadcast stations and networks.

² NAB has separately this date joined with other parties in urging that the Commission not utilize this proceeding as a vehicle by which to expand the FCC's existing definition of "indecenty". Joint Comments of Action for Children's Television, et al. We do not further address those matters here.

Public Notice characterizes this document as an "informal staff opinion".^{3 4}

4. The Luken letter summarizes the staff memorandum as concluding that "the no-censorship prohibition in Section 315 was not intended to override the statutory prohibition against the broadcast of obscene or indecent materials that is etched in Section 1464 of the Criminal Code." Therefore, the Luken letter states, the staff found "that it would be unreasonable to exempt broadcasters from Section 1464's criminal prohibitions."⁵

5. The staff memorandum itself observes "that a broadcaster would be justified in refusing access to a candidate who intended to utter obscene or indecent language, because Section 312(a)(6), which provides that the Commission may revoke a license for, inter alia, a violation of §1464, must be read to carve an exception to Section 312(a)(7)."⁶

³ Public Notice, ¶ 2.

⁴ In August, 1992, the Chief, Mass Media Bureau, declined to reach the issue of whether the analysis contained in the Luken letter and staff memorandum continues to reflect the Commission viewpoint. Letter to Vincent A. Pepper, 7 FCC Rcd 5599, 5560, n. 3 (1992).

⁵ The staff has from time to time suggested orally that this interpretation might extend to any violation of Federal criminal law. We urge the Commission to clarify whether this is the case at the time it resolves the instant proceeding.

⁶ Staff Memorandum, n. 17.

6. The Commission has repeatedly declined to rule in advance of a broadcast as to whether particular matter is "indecent" under its definition of such speech.⁷ In such circumstances, so long as the Commission holds the view that it is the broadcaster, and not the candidate, who is liable for broadcast of matter the Commission deems "indecent", the Commission must defer to the broadcaster's reasonable good faith judgment in finding the content of political advertising "indecent" and in channelling such matter under whatever "safe harbor" provisions are then in effect.⁸

7. This is particularly true because of the case-by-case basis on which the Commission deals with "indecentcy". The Commission has stated that "indecentcy determinations are highly fact-specific and are necessarily made on a case-by-case basis."⁹ It has therefore concluded that for the purpose of case law requiring it to treat similarly-situated parties similarly, two parties "would not be similarly situated...unless both the substance of the material they

⁷ See Letter to Vincent A. Pepper, supra; Letter to William J. Byrnes, (WBAI) (FM), 63 RR2d 216 (MMB 1987), review denied sub nom. Pacifica Foundation, Inc., FCC 87-215, released June 16, 1987; Letter to Christian Action Network, (MMB), released June 12, 1992. The Commission states that it has taken this position "to avoid imposing prior restraints on protected speech." Letter to Vincent A. Pepper, supra.

⁸ Of course, in leaving this responsibility to the broadcaster the Commission must necessarily also defer to the broadcaster's reasonable good faith judgment of what is not "indecent" under the Commission's definition.

⁹ Sagittarius Broadcasting Corporation, 7 FCC Rcd 6873, 6874, ¶ 8 (1992).

aired and the context in which it was broadcast were substantially similar."¹⁰

8. Yet the Commission is thrusting the responsibility of making the "indecentcy" determination on the broadcaster - who must act daily during the election season to respond to the myriad regulatory requirements imposed by the FCC to implement Sections 312(a)(7) and 315 -- under threat of fine, prosecution or license revocation for making the wrong decision. Clearly, great deference is due the broadcaster's determination in such circumstances. We ask that the Commission recognize this necessity in its resolution of this proceeding.

Respectfully submitted,

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¹⁰ Id.